1976

Richard Madsen and Nancy A. Madsen v. Prudential Federal Savings & Loan Associations : Reply Brief

Utah Supreme Court

Robert J. DeBry; Attorneys for Appellants.
Joseph J. Palmer; Moyle & Draper; Attorneys for Respondents.

IN THE SUPREME COURT
OF THE STATE OF UTAH

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RICHARD MADSEN and NANCY A. MADSEN, his wife,	)	
Plaintiff and Appellants,	)	
	)	CASE NO. 14530
-vs-	)	
PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION,	)	
Defendant and Respondent.	)	

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE BRYANT CROFT, DISTRICT JUDGE

ROBERT J. DEBRY
Attorney for Plaintiffs
and Appellants
2040 East 4800 South, Suite 203
Salt Lake City, Utah 84117

Joseph J. Palmer
Moyle & Draper
Attorney for Defendant
and Respondent
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD MADSEN and NANCY A. MADSEN, his wife,

Plaintiffs-Appellants,

vs.

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION,

Defendant-Respondent.

Case No. 14530

PETITION FOR REHEARING

Respondent respectfully prays the Court grant rehearing of the opinion and decision of January 14, 1977, herein.

This Petition is based upon the attached brief.

DATED this 3 day of February, 1977.

MOYLE & DRAPER

By Jos. J. Palmer
Joseph J. Palmer
Attorneys for Respondent
600 Deseret Plaza
Salt Lake City, Utah 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD MADSEN and NANCY A. MADSEN, his wife,	)	
Plaintiffs-Appellants,	)	Case No. 14530
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PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION,	)	
Defendant-Respondent.	)	

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

THE OPINION FAILED TO CONSIDER, AND IS CONTRARY TO, ALL FINAL CASES IN POINT

This case involves whether a mortgagee must account for use of tax reserves paid by the mortgagor. It is a case of first impression in Utah and is enormously important. It is filed as a class action, could affect more than 20,000 mortgagors of defendant, and could involve millions of dollars. It will affect every mortgage lender in the state and may create scores of class actions in the courts of the state involving many, many millions of dollars. It will affect the availability of Utah lenders' residential mortgage funds by affecting their ability to sell mortgages on the national market. The significance of the case may have been obscured to the Court because the named plaintiffs' case involved only $13.70 per year.

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of February, 1977, two true and correct copies of the foregoing Motion and Brief were mailed, postage prepaid, to Robert J. DeBry, attorney for appellant, 2040 East 4800 South, Suite 203, Salt Lake City, Utah.

Pauline E. Meyer

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POINT I

PRUDENTIAL'S ARGUMENTS ON PUBLIC POLICY ARE ILL FOUNDED

Prudential has devoted the major portion of its brief to public policy arguments. Madsen has two general responses to such arguments:

First, public policy arguments should play no role in a summary judgment proceeding. The reason is simple. Summary judgment is appropriate where there is no material fact in issue and the movant is entitled to judgment as a matter of law. The public policy considerations raised by Prudential depend on "material facts in issue." If this case is to be influenced by fact-related policy considerations, the matter should be remanded for further factual development by a trial. As the record now stands, all of Prudential's policy arguments are merely unsupported self-serving speculation.

Prudential's public policy arguments basically boil down to scare tactics. Prudential argues at length about all of the dire results that will follow if it loses. The argument apparently goes like this:

1. The home mortgage business is important to society.
2. The home mortgage business is complicated.
3. The home mortgage business now works well.
4. The courts should not tamper with an important economic system which seems to be working well.
5. Madsen's potential recovery is minimal.
6. The courts should not break up an important economic

institution simply to provide some minimal relief to Madsen.

That is a very appealing argument. The trouble is that all of the premises are false. For example, Prudential argues that, "the claim of Madsen, if successful, would adversely affect the marketability of mortgages in the secondary market." Brief of Respondent, p. 7. However, there is simply no basis in this record to conclude that this or any one of Prudential's other scare stories would come true if Madsen wins this case.

This has been conclusively demonstrated by the recent action of the Bank of America (see Brief of Appellant, p.18-19). The Bank of America is the largest banking institution in the world. It has voluntarily started a program to pay a regular passbook savings rate of interest on mortgage escrow accounts. Not one of Prudential's scare stories has come true to haunt Bank of America.

Madsen is tempted to respond in kind by theorizing for several pages on the beneficial economic results of requiring Prudential to pay interest on the impound funds. However, it is difficult to see how such speculation by either Madsen or Prudential is material to this lawsuit.

POINT II

THE INTENT OF THE PARTIES CANNOT BE CONSIDERED ON A MOTION FOR SUMMARY JUDGMENT

Prudential's brief is laced with arguments about what the parties intended. Apparently, Prudential's position is that the parties did not intend that interest be paid on the impound funds, and that the contract should be construed to follow the intent of the parties.

The problem is that in a contract case intent is a jury issue. In other words, if the contract is on its face unambiguous, the court can grant summary judgment as a matter of law. However, if the contract is ambiguous, the court may look to the intent of the parties as an aid in construction. However, intent is a fact issue and cannot be considered on a motion for summary judgment. B. F. Goodrich Co. v. A.T.I. Caribe, 366 F.Supp. 464 (1973 DC Del.), Ball v. Aetna Casualty & Surety Co., 58 FRD.362 (1973 DC Ky.).

POINT III

THE DOCTRINE OF PRACTICAL CONSTRUCTION IS INAPPLICABLE

Prudential's argument on practical construction is but another way for the court to determine the intent of the parties. Madsen has already responded to the "intent" argument in Point II above. However, something further needs to be said about the doctrine of practical construction.

Prudential's argument is basically that no one has ever complained about Prudential keeping the profits on the impound funds -- therefore the parties must have intended that Prudential could keep the profits.

There is, however, one fatal flaw in the argument. It is true that at the time the contract was signed Madsen did not demand or expect profits on the impound funds. However, there is nothing in this record to show that Madsen was ever aware that Prudential was investing the funds and earning a profit on such investments. Certainly Prudential made no such disclosure.

This lawsuit arises because Prudential, without the knowledge or consent of Madsen, invested the impound funds and earned a profit. Madsen seeks a share of that profit. The doctrine of practical construction cannot apply here because Madsen did not know that Prudential had invested his money and earned a profit thereon. Madsen could not ask for his share of the earnings since he did not know that such earnings existed.

POINT IV

PRUDENTIAL HAS AVOIDED THE CENTRAL ISSUE OF A COMMON LAW PLEDGE

Madsen's major thesis is that Prudential holds the impound funds as a common law pledge. At common law the pledgee is liable to the pledgor for any profit or increase in the pledged property.

Prudential attempts to dispose of this important issue in one short paragraph by arguing that "a pledge is the passing of a chattel." Brief of Respondent, p.30-31.

However, at common law money was considered a chattel and could be pledged. In 2 Blackstone's Commentaries 385, it is said:

> "That things personal, by our law, not only includes things moveable, but also something more; the whole of which is comprehended under the general name of chattels, which, Sir Edward Coke says, is a French word signifying goods. 'In the grand coustumier of Normandy, (he observes) a chattel is described as a mere moveable, but at the same time is set in opposition to a fief or feud so that not only goods, but whatever was not a feud, were accounted chattels; and it is in this latter, more extended negative sense, that our law adopts it'. . . ."

From Black's Law Dictionary (rev. 4th Ed.) we learn that fief and feud were freehold estates in land. Thus, anything which is

not a freehold estate in land is a chattel.

This definition of chattel was adopted by the Supreme Court of the United States in In re Gay's Gold, 80 U.S. (13 Wall.) 358 (1871). There it was said, "the word chattel, in its ordinary signification, includes every species of property which is not real or freehold. . . ." 80 U.S. (13 Wall.) at 362.

As to money specifically, State v. Bartlett, 55 Me.200 (1867) held that money is a chattel. That case was a prosecution for larceny "of the goods and chattels" of several people. The defendant asserted that money was neither a good nor a chattel; therefore, the indictment was defective. The Maine Supreme Court, quoting from Holthouse's Law Dictionary, held: "Chattels personal are generally such as are moveable and may be carried about the person of the owner wherever he pleases to go; such as money . . . ." 55 Me. 210.

Similarly, in Gockstetter v. Williams, 9 F.2d 928 (D. Mont. 1925), which involved the insolvency of a bank, the court held that personal property includes money, and all things of a personal nature are under the heading chattel.

Therefore, it is apparent that money was considered a chattel at common law. It does not seem to have ever been questioned that money could be pledged, the same as any other chattel.

POINT V.

CASE AUTHORITY CITED BY PRUDENTIAL IS NOT IN POINT

Prudential cites seventeen cases in support of its position. Brief of Respondent, p.22-23. However, not one of those cases is in

point. To begin with, all of those cases construe contracts different from the contract before this court.

However, more importantly, not one of those cases speaks to the pledge theory urged by Madsen. Indeed, most of those cases turn on a trust theory. Madsen has not urged any trust theory in this court.

In short, Prudential has cited seventeen cases which hold that banks do not hold impound funds in trust. Madsen agrees. However, Prudential has cited no cases which are in opposition to Madsen's pledge theory. At common law, the pledgor was required to account to the pledgee for any increase or profit on the property pledged. (See Brief of Appellant, p.5-9.)

Prudential relies most heavily upon Zelickman v. Bell Federal Savings, 301 N.E.2d (Ill. 1973), and Sears v. Federal Savings & Loan Assoc., 275 N.E.2d 300 (Ill. App. 1971). It is true that the agreements in both of these cases included the word "pledge". However, neither of those cases analyzed the legal result of a common law pledge. Indeed, both Zelickman and Sears assume that the impound fund was a pledge. The issue in those cases was whether a trust was created by the "pledge".

> "We must expressly reject plaintiff's argument that a trust is created because of use of the word 'pledge' in the note. . . . This contention is a complete oversimplification and is based upon the most elementary deductive reasoning. The syllogism is: Every pledge is a trust. This note contains a pledge. Therefore this note is a trust. However, the major premise is completely invalid. Every pledge is not a trust. Sears v. Federal Savings & Loan Assoc., 275 N.E.2d 300 (Ill. App. 1971)."

It should also be remembered that Madsen's appeal deals with a new and unsettled area of the law. Prudential has correctly pointed to a number of cases dealing with related issues or different fact situations. However, in such a new and unsettled area of the law, this court should look with caution upon the precedential value of a handful of cases from foreign jurisdictions.

POINT VI

THIS IS A JUDICIAL AND NOT A LEGISLATIVE PROBLEM

Prudential has made the argument that this dispute ought to be left to the legislature. Prudential cites no authority for that novel argument. Perhaps Prudential believes that the issues are too difficult or too important for this court to adjudicate.

Madsen has presented a contract issue to this court. From time immemorial, courts have construed contracts. This contract case is clearly a matter for judicial adjudication. Ross v. Oregon, 227 U.S. 150, 57 L.Ed. 458, 33 S.Ct. 220.

CONCLUSION

The payment by Madsen of impound funds to Prudential is a common law pledge. At common law the pledgee is entitled to any increase or profit arising out of the pledged property. Prudential chose the word "pledge". Prudential accepted the pledge. Then, without the knowledge or consent of Madsen, Prudential invested the pledge and earned a profit. On principles of law and justice as old as civilization, Madsen is entitled to the increase in the value of his pledge.

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October,]976, two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Joeseph J. Palmer of MOYLE & DRAPER, 600 Deseret Plaza, Salt Lake City, Utah 84]]].

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